In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1944

No. 673

CALIFORNIA SHIPBUILDING CORPORATION (a corporation),
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and BELLE REBECCA GADDIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
Second Appellate District, Division Three
and
BRIEF IN SUPPORT THEREOF.

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to the District Court of Appeal of the State of California, Second Appellate District, Division Three.

To the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision (Rec. 169) of the District Court of

Appeal of the State of California, Second Appellate District, Division Three, in the case entitled California Shipbuilding Corporation (a corporation), Petitioner, vs. Industrial Accident Commission of the State of California and Belle Rebecca Gaddis, Respondents (1 Civil No. 14,287 upon the records of said Court). (That Court will hereinafter be referred to as the "District Court of Appeal").

In this cause, your petitioner sought a writ of review to annul an award of respondent Industrial Accident Commission granting in favor of the applicant before it (Respondent Belle Rebecca Gaddis) a sum of money for alleged serious and wilful misconduct by your petitioner in connection with the death of her husband, an employee. (Rec. 2).

Proceedings for such writ of review of a decision of the Industrial Accident Commission are provided for by the Statutes of California and in the Constitution of the State of California.

Labor Code of California, Sections 5950-5956;
Constitution of California, Article XX, Section 21.

Thereafter, as permitted by California law,
Constitution of California, Article VI, Section 4c,
your petitioner applied to the Supreme Court of California for a hearing of said cause. This petition was denied, with two of the seven members of that Court voting in favor of a hearing. (Rec. 177). On the 31st day of July, 1944, a remittitur was issued by the District Court of Appeal after advice of the ruling of the

Supreme Court in denial of a hearing, although the remittitur is dated July 29, 1944. (Rec. 176). Within the three months' period following the date upon the remittitur, this Court has granted an extension of time within which to file this petition and the accompanying record.

Your petitioner has thus exhausted its remedy in the courts of last resort in the State of California.

THE OPINION UNDER REVIEW.

The opinion of the District Court of Appeal appears in the Advance Sheets of California decisions and may be cited as follows:

> *California Shipbuilding Corporation (a corporation) v. Industrial Accident Commission and Belle Rebecca Gaddis,* 64 A.C.A. 745.

The opinion of the District Court of Appeal also appears in this record. (Rec. 169-176). The portion thereof dealing with the federal question here presented commences at the bottom of page 174 of the printed record.

JURISDICTION.

The jurisdiction of this Court is invoked under that section of the Judicial Code,

28 U.S.C.A. 344, Par. (b),

which reads, in part, as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for

review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *"

THE FEDERAL QUESTION.

Your petitioner asserts that the manner of decision of the Industrial Accident Commission, in the proceeding subjected to review before the District Court of Appeal, did not constitute due process of law and was therefore in violation of the Fourteenth Amendment to the Constitution of the United States. Your petitioner was likewise deprived of due process of law in the District Court of Appeal in that its counsel was not permitted to argue upon the effect of evidence which had just been produced and which counsel, therefore, had no prior opportunity to examine or discuss. (*Infra,* p. 9).

The time and the manner of raising the constitutional question will appear hereinafter. (*Infra,* p. 8). It will be disclosed that the due process clause was availed of as soon as evidence was forthcoming of the method adopted by which the Industrial Accident Commission seemingly decided the case before it.

THE STATUTE CREATING THE COMMISSION.

Constitution of California, Article XX, Section 21,

bestows the power upon the Legislature to establish a system of workmen's compensation and to create, in the words of that section,

> "An administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation."

There is an express provision in the constitutional section that

> ". . . all decisions of any such tribunal shall be subject to review by the appellate courts of this state."

In pursuance of the authority thus conferred, the Legislature thereafter created a system of workmen's compensation and established an Industrial Accident Commission to hear and pass upon disputes arising under that Act. These provisions are now incorporated in the Labor Code of California.

Labor Code of California, Section 110 et seq.

The Industrial Accident Commission consists of three members.

Labor Code of California, Section 111.

A STATEMENT OF THE MATTER INVOLVED.

After obtaining the statutory death benefit for the death of her husband (Rec. 70-71), Belle Rebecca Gaddis, respondent herein, filed an "Application for Adjustment of Claim for Serious and Wilful Miscon-

duct on the Part of the Employer". (Rec. 71-72). The law of California permits the increase of the award to the extent of one-half, but not exceeding $2,500.00, where the employee has been injured or killed "by reason of the serious and wilful misconduct" of the employer or certain designated subordinates.

Labor Code, Section 4553.

Hearings upon the application were thereafter held before a Referee of the Commission. (Rec. 72-148). Findings and Award were made in favor of the applicant granting her a money payment in the sum of $2,500.00. (Rec. 148-150).

Your petitioner thereafter applied for a rehearing, as provided for by Statute. (Rec. 151-153).

Labor Code, 5900-5910; Stats. of Cal. 1937, Ch. 90.

On August 25, 1943 the Commission made its order denying the rehearing. (Rec. 154).

Then followed the petition to the District Court of Appeal for a writ of review. (Rec. 1-26). An examination of that petition will disclose that the petitioner argued at length that there was no showing whatever that the alleged serious and wilful misconduct was a proximate cause of the accident. (Rec. 19-23). We realize that reproduction of that argument, at any length, would not aid in the solution of the question presented by this petition. However, to establish the substantial nature of the petitioner's application, and the seriousness of the violation of the due process

clause, we trust that brief comment, hereinafter, will be in order as to the substance of the evidence introduced before the Commission. (*Infra,* p. 11.)

On December 15, 1943, the District Court of Appeal issued its Writ, requiring a certification from the Industrial Accident Commission of the record in the Gaddis proceeding. (Rec. 61-62). It is important to note that the Writ called for production from the files of the Commission of various memoranda prepared by the referee who conducted the hearing and by the so-called "reviewing referee" who considered the Petition for Rehearing.

At the oral argument of the cause before the District Court of Appeal, it was ascertained that the documents mentioned above, and called for by the Writ, had not been included in the return. This is evidenced by the order of the District Court of Appeal, under date of April 14, 1944, providing for augmentation of the record, with these documents specified more particularly than in the Writ. (Rec. 155-156). The various memoranda called for by the latter order are set forth at pages 157 to 168 of the printed record and will be summarized at a later point. (*Infra,* p. 12).

As will be shown, these memoranda in no wise stated or recapitulated any of the evidence on the all-important issue of proximate cause. The blanket adoption of the mere general conclusions of these memoranda by the members of the Commission created one inescapable result: the respective referees simply acted as Commissioners themselves.

The memorandum by Clell H. McCredie, Reviewing Referee, is of particular importance. (Rec. 158-159).

Introductory to the consideration of the latter, it is significant to observe that which the District Court of Appeal has found as a fact, with reference to the practice adopted generally by the Commission and utilized in the matter at bar. The opinion of the District Court of Appeal states (Rec. 175):

> "It is the practice of the Commission to submit an application for rehearing to a referee other than the one who conducted the hearing and recommended an award, and the practice was followed in this case. The reviewing referee made a memorandum recommending denial of the petition for rehearing. * * * The commissioners' order denying a rehearing was based upon this report and recommendation. *While the report did not include a summary of the evidence,** it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were established by the evidence, and *it stated as an ultimate fact that the employee's fall resulted proximately from the defective staging.*"

THE TIME AND MANNER OF RAISING THE FEDERAL QUESTION.

As the opinion of the District Court of Appeal recites, the original return, in failing to include the documents called for, was insufficient because the petitioner "challenged the competency" of the Commissioners, "since they had not heard the evidence and were not shown to have had knowledge of it." (Rec. 175).

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*Emphasis throughout is ours.

At the session of the District Court of Appeal when the order in augmentation of the record was made (Rec. 155-156) and when knowledge to counsel for your petitioner was available, for the first time, as to the manner in which this case seemingly had been adjudicated by the Commission, counsel for your petitioner offered to point out for the benefit of that Court, the deficiencies in these reports and memoranda and the consequent denial of due proces of law through their attempted utilization by the Commissioners in making a purported decision and order in the first instance and in the further order in denial of the rehearing. However, the District Court of Appeal then and there ruled that these reports and memoranda would be received in augmentation of the record without argument or comment by counsel.

It thus appears that the recital in the order of the Commission—that the members of the Commission had "reviewed" "the record"—is not correct. (Rec. 154, fol. 246). The District Court of Appeal has determined that they did not do so. (Rec. 174, fol. 272).

In the Petition for Hearing by the Supreme Court, after decision by the District Court of Appeal, counsel for your petitioner called attention to the failure of the Commission to have before it any record or anything amounting to a memorandum or summary on the issue of proximate cause. (Par. XXIV; Rec. 186). A certified copy of the Petition for Hearing in the Supreme Court, together with the points and authorities accompanying the same, is transmitted as a part of this record. The points and authorities just referred to are submitted simply for the purpose of

showing that the petitioner argued the violation of the due process clause to the court of last resort in California. (Rec. 191-192; 199-202).

THE METHOD OF DECISION HERE ADOPTED BY THE INDUSTRIAL ACCIDENT COMMISSION DOES NOT CONSTITUTE DUE PROCESS OF LAW.

The due process clause has been violated both in the original decision and in the decision of the Commission in denial of the rehearing. The deficiencies of all the memoranda, to enable the Commission lawfully to act, will presently be disclosed.

THE METHOD OF DECISION HERE ADOPTED BY THE DISTRICT COURT OF APPEAL LIKEWISE DOES NOT CONSTITUTE DUE PROCESS OF LAW.

We have heretofore called attention (*Supra,* p. 9) to the method of disposition of this constitutional question by the District Court of Appeal. The documents originally ordered to be produced were finally extracted from the Commission by a further order in augmentation of the record after the case had been argued theretofore. The District Court of Appeal declined to give opportunity to counsel to argue upon the deficiencies in the referee's memoranda and the consequent violation of the due process clause, when the documents became first available to petitioner's counsel, and after he had first had an opportunity to examine them. This, in itself, was not due process of law. Your petitioner so contended in the Petition for Hearing in the Supreme Court. (Par. XV; Rec. 183, fol. 278).

THERE WAS AN ISSUE, VIGOROUSLY CONTESTED, AS TO WHETHER THE ALLEGED SERIOUS AND WILFUL MISCONDUCT WAS THE PROXIMATE CAUSE OF THE DEATH.

The opinion of the District Court of Appeal itself demonstrates the woeful inadequacy of the attempted showing of any proximate cause of the alleged serious and wilful misconduct in bringing about the death of Mr. Gaddis. All that the evidence showed is adequately summarized in the opinion of the District Court of Appeal (Rec. 171, fol. 268):

> "At about 7 p.m. Gaddis announced to Morkal that he was going to get a drink of water. He started toward the ladderway, ostensibly to go to the ground where the fountain was located. A few minutes later Morkal saw him 'on the end of the scaffold where there was no scaffolding any further'; when he looked again Gaddis had disappeared. He had fallen to the ground level into a bin of stanchions at a point 10 or 15 feet from the ladderway and directly beneath the unfinished section of the platform. *No one saw the start of his fall and there was no direct evidence as to the cause of it.*"

To assume that Gaddis fell because of the insufficient scaffolding at the point (in question) away from the place where he had been working is to assume that he took an unsafe course when a safe one was available to him. As was also recited in the opinion of the District Court of Appeal. (Rec. 170, fol. 268):

> "Gaddis and a fellow workman, Morkal, had reached the sixth level, which was approximately 40 feet high, by means of a ladderway which led to a 24-inch catwalk above the sixth level, from which they had climbed down to the platform where they were working."

That the proximate cause flowing from the alleged serious and wilful misconduct existed in this case could only be the result of guess, suspicion and conjecture. Moreover, to decide that issue in the affirmative required the rejection of the presumption that one takes due care of his own safety. This presumption exists in California and in all other jurisdictions.

Code of Civil Procedure of California, Section 1963 (4);

Smellie v. Southern Pacific Company (1931), 212 Cal. 540, 299 Pac. 529;

31 *C.J.S.* (Evidence), p. 772, sec. 35.

Your petitioner argued before the Commission and before the District Court of Appeal of the insufficiency of the evidence, as a matter of law, to establish proximate cause. We recognize that this issue is no longer available on the Federal question herewith submitted. Nevertheless, the obvious merit of our position points to the necessity that the Commissioners should have been fully advised as to the details and nature of actual evidence on that issue.

IN VIEW OF THE PRESENCE OF THE STRONGLY CONTESTED ISSUE OF PROXIMATE CAUSE, THE REPORTS AND MEMORANDA IN THE HANDS OF THE MEMBERS OF THE COMSION WERE WHOLLY INSUFFICIENT.

The award of the Commission with respect to the alleged serious and wilful misconduct was rendered June 24, 1943. (Rec. 150, fol. 238a). An order to transcribe the testimony was not made until July 13, 1943.

(Rec. 153, fol. 245). It cannot be questioned, therefore, that the members of the Commission did not have before them the transcript of testimony when signing the original award.

The memorandum of the Hearing Referee appearing at pages 159 to 160 (fol. 255 et seq.) of the printed Record is wholly devoid of any reference to the issue of proximate cause or to the evidence pertinent thereto, except for the bare conclusion (Rec. middle of p. 160): "I felt that the testimony very definitely established that the injury and death were proximately caused by the serious and wilful misconduct of the employer." No discussion of the state of the record on that issue is included in the memorandum, and he therefore submitted to the members of the Commission nothing but his own bald conclusion.

Likewise, the additional memorandum of the Hearing Referee, in which he purports to summarize the testimony of certain witnesses, is wholly devoid of any showing, or discussion, upon the subject of proximate cause. (Rec. 161-165, fol. 257 et seq.). The same is true of the Hearing Memorandum made on March 8, 1943. (Rec. 165-167, fol. 261 et seq.).

It cannot be denied that the Hearing Referee decided this case, not the members of the Commission. They had before them nothing upon which they could have decided it.

In the petition for rehearing, the so-called Rehearing Referee was faced with the contention that there was no proof of proximate cause, and made reference

to that contention at the inception of the memorandum. (Rec. middle of p. 158). His only attempt to dispose of the question of proximate cause was in these words (Rec. middle of p. 159):

> "The accident occurred after dark. There was no immediate eye witness to the fall but from the evidence it appears reasonable to believe that, due to the poor lighting which was shown to have existed, applicant fell thru one of the gaps in the planking of the scaffold over which he had to pass. From this it appears that the violation was the proximate cause of the death which, in my opinion, completes the case of serious and wilful misconduct."

There was no reference to the testimony of any named witness, the number of lights, the extent of lighting, or any summarization of the testimony. Incidentally, the record will be searched in vain for any testimony showing the lack of sufficient lighting.

Finally, the manner of adjudication by the Rehearing Referee assumes that the deceased took a route which by no means appeared to be his actual route.

Thus it is also true that the Rehearing Referee passed upon and decided the petition for rehearing—not the members of the Commission. Again, they had before them nothing upon which they could have based an independent decision.

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. The issuance of this writ will enable this Court to decide a question of exceeding importance, as more particularly shown by the brief accompanying this petition.

2. As also disclosed by the brief, the respondent Commission disregards the decisions of this Court in the two *Morgan* cases. The decision of the District Court of Appeal likewise fails to apply the doctrine of the *Morgan* decisions—and those decisions govern the facts here appearing.

3. The procedure adopted by the Industrial Accident Commission in this case and in all of the others before it does not meet the simplest requirements of due process of law.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the District Court of Appeal of the State of California, Second Appellate District, Division Three, for a review by this Honorable Court of the proceedings in said District Court of Appeal in the case numbered and entitled in its docket 2 Civil No. 14,287, California Shipbuilding Corporation (a corporation), Petitioner, vs. Industrial Accident Commission of the State of California and Belle Rebecca Gaddis, Respondents, and petitioner further prays that upon such review the decision of said District Court of Appeal be set aside and reversed and that said Court be instructed by your Honorable Court to issue its judgment and decision annulling and vacat-

ing said award made by Respondent Commission and that your petitioner have such other and further relief as may be meet, proper and equitable in the premises.

Dated, San Francisco, California,
November 10, 1944.

MAX THELEN,
GORDON JOHNSON,
Counsel for Petitioner.